91-1588

(1)

Supreme Court, U.S.
FILED
FEB 24 1992
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILLARD A. SULLIVAN,
PETITIONER

V.

UNITED CAROLINA BANK,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLARD A. SULLIVAN
Pro se

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(304) 345-2045

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court's Rule 11 sanctions against a defense lawyer, without taking evidence on the allegations of plaintiff's motion for sanctions, constitutes, as to the defense lawyer, deprivation of property "without due process of law", in violation of the Fifth Amendment.

2. Whether a district court has abused its discretion under Rule 11, as interpreted by *Cooter v. Hartmarx*, by deciding the issue of frivolity entirely upon the question of who prevailed upon the defense issues (and not applying the same standard to the issues upon which the defense prevailed).

II. LIST OF PARTIES

The parties to the proceedings in the Fourth Circuit, the court whose judgement is sought to be reviewed, were:

(1) United Carolina Bank, a named respondent here;

(2) Donald C. Carman, Oceana Corporation and Lexington Oil Corporation, originally defendants in the district court and appellants in the circuit court; and,

(3) Willard A. Sullivan, the petitioner herein.

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V. OPINIONS BY OTHER COURTS

The unpublished denial of Sullivan's petition for rehearing with suggestion for rehearing *in banc*, filed November 25, 1991, is reproduced as Appendix I.

The unpublished opinion of the Fourth Circuit, dated October 8, 1991, affirming the district court's granting of Rule 11 sanctions against petitioner Sullivan, is reproduced as Appendix II.

Excerpts from the voluminous "memorandum order" of the United States District Court, dated August 2, 1990, are reproduced as Appendix VIII.

VI. STATEMENT OF JURISDICTION

The jurisdiction of the Court is based on 28 U.S.C. sec. 1257. The order of the Fourth Circuit denying the petition for rehearing was entered November 25, 1991 and this petition is filed within 90 days.

VII. CONSTITUTIONAL AND RULE PROVISIONS

The Fifth Amendment to the United States Constitution, states the pertinent part, as follows:

"No person shall be . . . deprived of . . . property, without due process of law."

Rule 11, Fed. R. Civ. Proc. provides:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address ... The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading,

motion, or other paper; that to the best of the signer's knowledge, information, and belief from and after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

VIII. STATEMENT OF THE CASE

This is an appeal of Rule 11 sanctions imposed by the United States District Court for the southern District of West Virginia against Willard A. Sullivan who was counsel for several defendants, Donald C. Carman, Oceana Corporation and Lexington Oil Corporation, who were sued by the United Carolina Bank (hereinafter "UCB"). The basic suit was on a so-called demand note, upon which defendants were not in default and which had a peculiar provision: the individual endorser, Donald C. Carman, would be relieved from liability on the note should the primary obligor, Oceana Corporation, become part of a publically-held corporation. When that event was announced, UCB called the note, even though not in default, and proceeded to pursue its remedies against Oceana and its assets, and other defendants.

The underlying case, including defendants' counterclaim, was disposed of by summary judgement after the trial court dismissed as "conclusionary" two affidavits of the defendants which supported the counterclaim and without which defendants had no case on their counterclaim.

After summary judgement was granted, "UCB" moved for sanctions against all the defendants and Sullivan, requesting $100,317.39 in fees and expenses incurred in defending against what it characterized were frivolous defenses asserted by the defendants and a frivolous counterclaim. After a hearing only the question of plaintiff's legal fees, the court imposed sanctions, jointly and severally against defendants Carman, Oceana and Sullivan totalling $71,947.03. Lexington Oil was held jointly and severally liable for $58,133.03 of that amount.

The facts are as follows:

In August of 1985, about the time when Lexington Oil, the owner of Oceana, was to go public, "UCB" called the note and started foreclosure proceedings against Oceana. "UCB" claimed that upstream transfers of cash by Oceana to Lexington Oil jeopardized its collateral and weakened Oceana. Suit was filed by "UCB" against Carman, Oceana and Lexington Oil in South Carolina alleging that the note was in default because the inventory and accounts receivable were allowed to deteriorate. A consent judgment against Oceana for $1,009,770.80 was granted in South Carolina. Default judgements were also taken against Carman and Lexington Oil in South Carolina for $572,278.92, including $50,488.54 for attorney fees.

In November of 1985, "UCB" filed suit in West Virginia state court, on the South Carolina judgments and the note. The amended complaint also contained a count for fraud against Carman alleging that certain real estate transfers by Carman and Oceana fraudulently depleted the assets of Oceana. The Complaint

sought $600,000 in compensatory damages and $500,000 in punitive damages.

The defendants removed the case to federal court and filed an answer and counterclaim signed by their counsel, the petitioner Sullivan. (The two other defendants in the case were Emma Lou Carman and D.C. Industries, Inc.). The answer alleged that although Oceana had confessed judgment in South Carolina, the obligation of Carman as guarantor had not been ascertained because the collateral held by "UCB" was sufficient to satisfy the debt. The answer also contended that the default judgment taken against Carman and Lexington Oil in South Carolina was not entitled to full faith and credit in West Virginia because of improper service of process and because Carman was never subject to the jurisdiction of the South Carolina court. It was alleged that an agreement existed between "UCB" and Carman that no judgment would be taken aginst him in South Carolina. The answer also disputed the amount of monies owed to "UCB" because of the value of the collateral "UCB" held and the continuing collection of Oceana's accounts receivable.

A counterclaim was asserted against "UCB" alleging fraud, conspiracy and racketeering in violation of the Racketeering Influence and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961, *et seq.*, abuse of process and malicious prosecution. The counterclaim alleged that "UCB" conspired to cause the demise of Oceana, and sought compensatory damages of Five Million Dollars and punitive damages equal to "UCB's" net worth.

Virtually all the discovery in this case was ititiated by "UCB" and "UCB" asked the trial court for an extension of discovery cut-off dates. Many depositions were taken by "UCB" counsel all over the country; even in unrelated cases, bankruptcy proceedings were attended by "UCB" counsel in St. Louis. This case went on for almost two years.

The district court's granting of summary judgement, at least

insofar as it pertained to the R.I.C.O. counterclaim, was based upon striking from the record the affidavits of Burgess Johnson (App. V) and Sullivan (App. VI). The affidavits were rather specific; the judge's ruling, in conclusionary terms. was that the affidavits themselves were conclusionary. The opinion stated that the affidavits "contained only conclusionary allegations... ." (App. VIII)

Of course, the affidavits speak for themselves, to the end that the granting of summary judgement in favor of plaintiff (UCB) was not proper in this case; there was no evidence, period, presented in support of plaintiff's motion for sanction (App. VII). Notwithstanding Sullivan's repeated requests and those of other counsel, the trial court simply refused to require UCB's counsel to provide any evidence of liability or culpability for sanctions. The only evidence presented was by affidavit of the Bank's counsel and was for the alleged fees as damages.

This case was initially filed in the Circuit Court of Kanbawha County, West Virginia, then removed to the United States District Court pursuant to the statutory provisions for removal, diversity of citizenship and the amount in the controversy.

IX. ARGUMENT

The Fourth Circuit Court of Appeals, in an unpublished, *per curium* opinion, blindly upheld the district court's opinion that recognized the conflict between at least the 2nd and 4th circuits as to the standard of judging, under Rule 11, frivolous actions of clients and lawyers. (App. II)

Moreover, the Fourth Circuit ratified an opinion of the trial court (wherein there was no trial) which suggested that the mere failure to prevail on the merits of an argument was sufficient grounds to hold a lawyer liable for sanctions (read: "damages")

without evidence of liability. There simply was never a hearing on UCB's conclusionary allegations of "meritless defenses" and improper pre-litigation investigation by defense counsel, petitioner Sullivan. And, even in the Fourth Circuit, apparently some relevant information was ignored. See Appendices III and IV.

Without proper, specific notice of charges and a proper hearing, Sullivan incurred property losses of $72,844.53, in obvious violation of the Fifth Amendment.

It should be emphasized, as explained above, that Sullivan continued to request a hearing of the charge that he did not investigate the allegations of the complaint, when he had been involved in the case long before the lawsuit was filed by UCB, a fact reluctantly admitted by the district court. (App. VIII).

No evidence of wrongdoing was offered to the district court in this case, because there was no wrongdoing. An attorneys conduct "shall" be sanctioned if, but only if, "a violation is found." *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. _____, 110 S. Ct. 2447, *2460*, 110 L. Ed. 2d 359 (1990). See App. VII, pp. 36-41.

Here, Sullivan continually asked the court to require UCB to produce evidence of his lack of investigation or to state how any pleadings were frivolous.

Nothing was said in the court's opinion about the definition of the word "frivolous", as used in Rule 11. Virtually any dictionary will provide the same definition. For example, the *Random House Unabridged Dictionary of the English Language* (Random House, 1966), defines "frivolous" as the obvious: "of little or no weight", and goes on to further define it as a "lack of seriousness" and as something asserted with "undue levity." No such levity is in the case here.

Black's Law Dictionary (4th. ed., 1951) suggests that an "answer is frivolous where it appears from bare inspection to be lacking in legal sufficiency, and, where in any view of the facts pleaded, it does not present a defense." Clearly not the case here.

The district court did not address the definitions of "frivolity" and "frivolous", but rather equated these terms with failing to prevail on the merits of certain defenses (and a counterclaim) which he found to be without merit. See App. VIII, pages 8, 23, 24, and 27. This cannot be the standard.

Here there was an erroneous view of the law in that the district judge, as to the petitioner, applied the test of merely determining which party prevailed on the merits of the case; and, while applying the rule; "who prevails", against the defendants and Sullivan, it refused to apply the same rule against UCB on behalf of D.C. Industries, which prevailed, for example. (See App. VIII). His rule is clearly wrong. It is "attorney honesty" and not the " the merits of the action" which counts. *Notes of Advisory Committee on Rules*, under Rule 11, U.S.C.A., p. 409.

Further, with respect to the counterclaim, as the district court's memorandum shows, the judge indicated that the counterclaim failed because of the striking the affidavit of one Burgess Johnson. The judge said, in response to Sullivan's statement that there was reliable information as to a pattern of interstate fraud: "You never presented any of that to the court." Sullivan replied "I certainly did. I presented the affidavit of Burgess Johnson." "THE COURT: You must be jesting". (App. VII, p. 38). His mind was made up: Stricken affidavits are not relevant in considering the legitimacy of a lawyer's good faith pleading (albeit, at first, on reliable, but second-hand information) within the time constraints of the rules pertaining to answering and filing compulsory counterclaims.

The evidence is stricken, the counterclaim is lost and the judge presumes to impose sanctions, based ultimately upon the Bank's lawyer fees, on the disposition of the case. In his opinion, the judge merely called the Johnson affidavit "useless" (App. VIII, p. 18), without further details. He then presumed to define the

"reality" that "there was never any evidence to support the RICO counterclaim." The judge had stricken the affidavit in the first place because the four-page document was "conclusionary", in his word: "useless.," without explanation or analysis.

Perhaps the most perplexing angle to the district court's ruling is the total lack of cited legal authority which supports any part of the basis for the judge's ruling and order. Finding against a lawyer's cause on the merits of the case provides no grounds for sanctions, especially the opposing party's legal fees. We do not have the English system. And what are American judges for? Are they to decide cases in recognition that a lawyer has an ethical duty to vigorously pursue every claim or defense that can be supported by authority or logic? An enlightened view of such Rule 11 questions was presented in *Eastway Construction Corp. v. City of New York*, 762 F. 2d, 243, 254 (2d Cir. 1985) in which the court of appeals said that the rule should not "stifle the enthusiasm or chill the creativity that is the very lifeblood of the law."

The district judge made no specific findings that Sullivan's arguments were not logical or without authority. Indeed, he could not. The judge's duty was to tack through the murky waters of genuine legal conflict and to decide the merits of the case. By cavalierly equating failure to prevail with frivoloty, the district judge has muddied the waters of American jurisprudence further.

There is no question here but that the issue of frivolity was decided entirely on the basis of who prevailed (except as to the issues pertaining to D.C. Industries, on all of which that defendant prevailed). There is also no question that the district judge decided the sanction question on a basis other than frivolity and without any evidentially hearing on the question of liability, thus denying Sullivan, obviously, due process of law.

CONCLUSION

For the reasons stated, petitioner, Willard A. Sullivan, hereby requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, command that the record below be brought before it, and ultimately reverse the decisions below.

Respectfully submitted,

/s/ Willard A. Sullivan
Willard A. Sullivan, *Pro se*

/s/ James H. Coleman
James H. Coleman
Counsel for Petitioner

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED: November 25, 1991

NO. 90-1830
CA-85-1481-2

UNITED CAROLINA BANK
Plaintiff - Appellee

v.

DONALD C. CARMAN; OCEANA CORPORATION, a South Carolina Corporation; LEXINGTON OIL CORPORATION, a Delaware Corporation;
Defendants - Appellants

WILLARD A. SULLIVAN
Appellee

and

EMMA LOU CARMAN, his wife; D.C. Industries, a Corporation
Defendants

No. 90-1845
CA-85-1481-2

In Re: WILLARD A. SULLIVAN
Appellant

THE UNITED CAROLINA BANK
Plaintiff - Appellee

v.

DONALD C. CARMAN; EMMA LOU CARMAN, his wife; OCEANA CORPORATION, a South Carolina Corporation; LEXINGTON OIL CORPORATION, a Delaware Corporation; D.C. INDUSTRIES, a Corporation

Defendants

On Petition for Rehearing with Suggestion for Rehearing *In Banc*

Appellant has filed a petition for rehearing with suggestion for rehearing *in banc*. No member of the Court requested a poll on the suggestion for rehearing *in banc*, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing *in banc*.

Entered at the direction of Judge Niemeyer, with the concurrence of Judge Wilkinson and Judge Wilkins.

For the Court,

/s/ John M. Greacen
CLERK

APPENDIX II

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED CAROLINA BANK, Plaintiff-Appellee, v. DONALD C. CARMAN; OCEANA CORPORATION, a South Carolina Corporation; LEXINGTON OIL CORPORATION, a Delaware Corporation; Defendants-Appellants, WILLARD A. SULLIVAN, Appellee, and EMMA LOU CARMAN, his wife; D.C. INDUSTRIES, a Corporation Defendants.	No. 90-1830
In Re: WILLARD A. SULLIVAN Appellant, THE UNITED CAROLINA BANK, Plaintiff-Appellee, v. DONALD C. CARMAN; EMMA LOU CARMAN, his wife; OCEANA CORPORATION, a South Carolina Corporation; LEXINGTON OIL CORPORATION, a Delaware Corporation; D.C. INDUSTRIES, a Corporation. Defendants	No. 90-1845

Appeals from the United States District Court
for the Southern District of West Virginia, at Charleston.
John T. Copenhaver, Jr., District Judge.
(CA-85-1481-2)

Argued: July 9, 1991

Decided: October 8, 1991

Before WILKINSON, WILKINS, and NIEMEYER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Christine Ann Machel, WILLIAM E. WATSON & ASSOCIATES, Wellsburg, West Virginia, for Appellants, David Dale Johnson, III, SPILMAN, THOMAS BATTLE & KLOSTERMEYER, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

United Carolina Bank initiated this action in state court to collect on promissory notes which it held. The case was removed to federal court and the defendants, with the advice of their attorney, Willard A. Sullivan, filed an answer and a counterclaim which sought $5 million in compensatory damages and the net worth of

the bank (estimated by defendants to be in excess of $1 billion) in punitive damages for creating "a financial crisis for defendants." The defendants relied, among other grounds, on the RICO statute, 18 U.S.C. § 1961. After various amendments were made to the pleadings and some discovery was pursued, the bank filed a motion for summary judgment. The district court granted the motion for summary judgment. The district court granted the motion, awarding the bank the amounts claimed on the notes and dismissing the counterclaims as baseless. Even after that judgment, the defendants, or some of them, continued to press their claims, including post-trial motions and two appeals to this court.

When all motions and appeals were denied, the bank filed a motion for sanctions against defendants for having to defend against the meritless defenses pleaded in the answer and the counterclaim. The district court granted the motion against two corporations, their principal, and Willard A. Sullivan, their attorney, and denied the motion against the other defendants. The defendants and Willard A. Sullivan have appealed, Sullivan representing himself and the remaining appellants represented by new counsel.

We have reviewed the record carefully, considered the arguments of the parties and counsel, and studied the decision of the district court. Finding the arguments of appellants without merit, we affirm the judgment of the district court for the reasons given by the district court in its well-considered opinion. United Carolina Bank v. Carman, et al., Civil Action No. 2:85-1481 (S.D.W.V. Aug.2,1990). J.A. 387-416.

APPENDIX III

FILED: April 18, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90 -1830 (L)

UNITED CAROLINA BANK,
Plaintiff - Appellee,

versus

DONALD C. CARMAN; OCEANA CORPORATION, a South Carolina Corporation; LEXINGTON OIL CORPORATION, a Delaware Corporation,
Defendants - Appellants,

EMMA LOU CARMAN, his wife; D.C. INDUSTRIES, a Corporation,
Defendants.

ORDER

Appellant Willard A. Sullivan has filed a motion to supplement the record on appeal with two depositions taken in 1986. The other parties have consented to the granting of the motion.

The Court supplements the record on appeal pursuant to Rule 10(e) of the Federal Rules of Appellant Procedure with the depositions of Leroy Johnson Saunders and Donald C. Carman.

For the Court - By Direction

/s/ John M. Greacen
CLERK

APPENDIX IV

WILLARD A. SULLIVAN
Attorney at Law
1405 Lyndle Drive
Charleston, WV 25314
(304) 345-2045 * (304) 768-5200

July 29. 1991

Mr. John Greacen, Clerk
United States Court of Appeals
10th and Main Streets
Richmond, Va 23219

Re: United Carolina Bank v. Donald C. Carman; Oceana Corporation; Lexington Oil Corporation; and Willard Sullivan Nos. 90-1830 90-1845

Dear Mr. Greacen:

When I talked with one of your deputies earlier this week, I was told to send this letter to the Clerk's office and that you, in turn would forward copies to the judges on the panel that heard oral argument in the above cases on July 9, 1991 in Columbia, S.C.

I am concerned about a practical, procedural matter: whether the depositions of Donald Carman and Joseph Sanders; previously ordered filed by the court ore, in fact, literally before the court. This is to ask: Does the panel actually have access to these depositions?

I raised the question simply because the Clerk's office has sent one of these depositions, which I had sent to your office, back to me. Are they there or not?

* * *

Please reply as soon as convenient, because I can arrange for you to have these important depositions.

Very truly yours,

/s/ Willard A. Sullivan
Willard A. Sullivan

cc: Christine Machel, Esq.
William E. Watson & Associates
800 Main Street
Wellsburg, WV 26070

David D. Johnson, III, Esq.
Spilman, Thomas, Battle & Klostermeyer
P.O. Box 273
Charleston, WV 25321-0273

James H. Coleman, Esq.

Copies enclosed for:
Judge Neiymeier
Judge Wilkinson
Judge Wilkins

APPENDIX V

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

UNITED CAROLINA BANK,
Plaintiff
v. Civil Action No. 2:85-1481

DONALD C. CARMAN and
EMMA LOU CARMAN, his wife;
OCEANA CORPORATION, a South Carolina corporation;
LEXINGTON OIL CORPORATION, a Delaware corporation;
and D.C. INDUSTRIES, a corporation,
Defendants.

AFFIDAVIT

STATE OF NORTH CAROLINA
COUNTY OF RICHMOND, to wit:

This day came Burgess O'Neal Johnson who, after being first duly sworn, did depose and say as follows:

1. I am a resident of the State of North Carolina and a citizen of the United States.

2. I am not personally interested in the outcome of the above-styled case.

3. I first learned of the above case by reading of it in the plaintiff's annual report, which led me to check the South Carolina records where I learned more about the south Carolina judgments against Oceana Corporation and Donald C. Carman.

4. The records revealed a situation which caused me to

think that the banking transactions between United Carolina Bank and Oceana and Carman were similar to those that occured previously between that Bank, on the one hand, and myself and affiliated business, on the other.

5. As a result of my investigation, I learned of several other persons similarly treated by the Bank, including Gene A. and Jeanett M. Watts, of Southport, North Carolina, whose address I do not know, but whom I feel I can locate to appear as witness in the above case.

6. Following my investigation, I contacted Donald C. Carman, a defendant here, by telephone to discuss this case, and, particularly the defendants' RICO counterclaim and the plaintiff's allegationsa of fraud. Mr. Carman and I talked, by telephone, on several occasions folowing which, upon his suggestion, I telephone Mr. Willard Sullivan.

7. At the suggestion of Mr. Sullivan and as soon as my schedule permitted, I went to meet him at his office in Charleston, WV on February 24, 1987. This was the first time we had met and I gave to him much information, including a sustantial volume of documents and notes, about which we talked over the next couple of weeks.

8. Finally, on or about March 11, 1987, Mr. Sullivan, by telephone, asked me if I would be willing to prepare an affidavit in support of defendants' position in the matter of pending motions for summary judgment and I agreed to do so.

9. Since that time I have been away from home, on business, and have returned April 13, 1987, the date I understand to be the date this affidavit is due. I intend to submit it to this court immediately upon my return to North Carolina.

10. Mr. Sullivan, whom I understand to be counsel for defendants, has diligently pursued his quest for information, calling me on many occasions to arrange for our meeting in

Charleston in late February and, since then, concerning this affidavit.

11. In my situation, which I consider to be similar to, or in the same pattern of, the transactions between the plaintiff Bank and the defendants Carman and Oceana, the Bank did the following:

(a) It improperly (without proper notice and without proper advertising) presumed to foreclose upon property of Hermco, Ltd., owned by me, and then tried to sell the property to directors and stockholders of the Bank.

(b) It made known to First National Bank of Winter Park Florida, the foreclosure, which resulted in the denial of a $450,000.00 loan, previously committed to by First National for funds to service short term demand notes until a loan could be secured for the Holiday Inn, and thus paying off all short term debt.

(c) UCB through its Senior V.P. called the lender where Hermco, Ltd. had a $3,200,000.00 loan commitment for the Holiday Inn, and told them of the foreclosure; thus, cutting off Hermco's loan.

(d) Once the Bank caused the denial of my hotel financing and, later, the consequent denial of my franchise by Holiday Inn, for which I paid some $100,000.00 (including extension time while these various matters were being discussed, negotiated and litigated), several officers, directors, stockholders, friends and preferred customers obtained a franchise from Holiday Inns too, and they are planning to build a hotel 1.5 miles from the Hermitage using Federal UDAG Funds from the City of Rockingham, North Carolina.

(e) From my conversation with other people, it is apparent that the plaintiff Bank has continually proceeded to do

what they did to me and my companies, and to Oceana and Mr. Carman, namely use any excuse to presume to call any note due and then sell the collateral securing the notes to its own officers and directors and their friends at a fraction of the real value of the property. The Watts couple, previously referred to, are prime examples.

12. Further this affiant saith not.

/s/ Burgess O. Johnson
Burgess O. Johnson

[Notary statement omitted]

APPENDIX VI

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

UNITED CAROLINA BANK,
Plaintiff,
v. Civil Aciton No. 2-85-1481

DONALD C. CARMAN and
EMMA LOU CARMAN, his wife;
OCEANA CORPORATION, a south
Carolina corporation;
LEXINGTON OIL CORPORATION,
a Delaware corporation;
and D. C. INDUSTRIES, a
corporation,
Defendant.

AFFIDAVIT OF WILLARD A. SULLIVAN

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

On this 13th day of April, 1987, came affiant, Willard A. Sullivan, and, first being duly sworn, says as follows:

1. He is counsel for defendants in the above-styled case and has prepared this affidavit in response to this Court's order of April 6, 1987.

2. He first talked to Burgess Johnson, a potential witness, by telephone a few weeks prior to meeting him in person at this office in Charleston, West Virginia on February 23 and 24, 1987.

3. Johnson's call was on his own part and gratuitous as far as he knows.

4. He does not know how Johnson learned of this particular case, and, indeed, does not know how Johnson may have been located. Upon representations made to him - namely, that Johnson first learned of this case from plaintiff's annual report and, on his own concluded that defendants had been the victim of fraud by plaintiff and that, as a consequence, Johnson searched various court records in South Carolina and came across, among other cases, the original South Carolina judgment against Oceana Corporation. He believes Johnson's case - involving interstate fraud by plaintiff, not to mention other similar acts of which Johnson says he knows - will establish a pattern of interstate rackettering on the part of the plaintiff.

5. He has attempted, without success, to contact Johsnon for some 10 days; he is informed by Johnson's wife, and believes, that Johnson is in Florida but will return to North Carolina this day.

6. He has previously sent to Johnson's North Carolina address a suggested affidavit based upon his conversations with Johnson and upon Johnson's voluminous notes previously provided to him.

7. So far as he knows Johnson is still absent from North Carolina.

8. He did not know of the existence of Burgess Johnson until Johnson volunteered himself; he did know of other persons who have knowledge of the improper actions of the plaintiff, but Johnson's information, in his opinion, is relevant in that it establishes a "pattern" of unlawful activity under RICO, as alleged in defendants' counterclaim.

9. Furthermore, he, from his own exposure to the matters in controversy here, knows the following:

(a) Joe Sanders, Vice President, of the plaintiff, testified at his own deposition that plaintiff solicited the loan from Oceana which is the underlying transaction with which the Court is here concerned.

(b) Immediately prior to (and he believes it to be the same day) the calling of the loan, Joe Sanders called him to inquire about a favorable settlement Carman's affiliated companies had obtained in a matter then pending in this very Court (before Judge Knapp), the *United Coal Co. v. White Ash Mining Co.* case. Sanders represented to him that he merely wanted to know if a substantial amount of money was involved, to which the answer was in the affirmative.

(c) Immediately prior to the Sanders conversation, he had been telephoned by Donald C. Carman who informed him of two things: (1) Carman was then at the plaintiff Bank in North Carolina and was going to New York to attempt to merge Oceana into a publicly-held corporation, thereby relieving him of his personal guaranty on the Oceana note, as provided by plaintiff's printed form.

(d) It is, in his opinion, readily apparent that Sanders represented one thing: namely that he wanted to be assured of Carman's companies' ability to carry on business; while he really wanted another: namely, the assurance that if the Oceana note were called, the money to pay it would be immediately available.

(e) Upon his investigation of this case, including his interview of defendants' accountant, he is convinced (1) that had the note not been called, Oceana could have remained in business; (2) that the call from Sanders to him was deceitful in that Sanders represented one

purpose, while the real purpose was another, as explained above; and (3) that the loan was not in default when it was called.

(f) During August of 1986, two meetings were held in Charlotte, North Carolina, for the purpose of resolving this matter, during the second of which Howard Hudson, in-house counsel for the plaintiff, in his presence, threatened Carman with criminal prosecution if he did not pay the loan amount then claimed to be due.

(g) He believes that Johnson could not have been located by usual discovery techniques in that the plaintiff has denied the defendants' allegations of fraud and racketeering here and could not, being consistent, have provided similar acts of such activity should an interrogatory, for example, have requested similar acts.

10. Further affiant saith not.

/s/ Willard S. Sullivan
Willard A. Sullivan

[Notary statement omitted]

APPENDIX VII

Excerpts from the transcript of proceedings before the U.S. District Court on January 18, 1990 in the case of UCB v. Donald C. Carman, et al., CA. No. 2:85-1481.

Pp. 3 - 4

THE COURT: Mr. Sullivan, have you any evidence to offer in support of your motion beyond that already set forth in the papers that you filed?

MR. SULLIVAN: No. I think my motion, Your Honor, rather speaks for itself. I would like, however, to cross-examine Mr. Johnson on his affidavit that he submitted in support of his motion.

THE COURT: Well, we'll see about that in a moment.

* * *

Pp. 9 - 10

THE COURT: Thank you. Now then, let me ask the nature of the inquiry that you propose, Mr. Sullivan. You indicated, I believe, in an answer earlier filed, that you agree that the hourly rates charged are appropriate, and do you take exception to any of the work that was done?

MR. SULLIVAN: I take exception to the filing of the case to begin with. I think - -

THE COURT: Please, please, Mr. Sullivan, let's don't get into that. The court has already made it abundantly clear in the final order entered in this case that the counterclaim was totally baseless that you filed. And at the same time, the court also made it abundantly clear that the plaintiff was entitled to relief, did so on a motion for summary judgment. We're past that point and we're not going to relitigate.

* * *

Pp. 18 - 20

THE COURT: Mr. Sullivan.

MR. SULLIVAN: Your Honor, I'm not willing to concede that the test for sanctions is whether you win or lose on the merits of a lawsuit.

THE COURT: No one is suggesting that. You can rest assured that that, of course, is not the guideline.

MR. SULLIVAN: Well, we've heard a lot of use of the term "meritless defenses" and I suggest that the complaint as it relates to D.C. Industries is the most meritless pleading in the whole case. The test, as I understand it --

THE COURT: Are you representing D. C.?

MR. SULLIVAN: I have made this argument on behalf of D.C.

THE COURT: I said, are you representing D.C.?

MR. SULLIVAN: Today, no, Your Honor, but I have asserted that in the past on behalf of D.C. But I jsut want the record, to make it clear, that my research at least indicates that the standard for Rule 11 sanctions is whether there was some good faith -- some good faith basis for the assertion; not whether it ultimately was determined to be valid on the merits of the case. That's what judges are for. But whether there was some good faith for making the assertion in the beginning. In other words, was there some sense of investigation, and there has been no evidence produced here that there was any lack of investigation by myself or any of the other -- any of the defendants.

THE COURT: Well, you continue to make those conclusory statements as you have made in pleadings and papers throughout, but simply because you make the conclusory statement doesn't make it so, Mr. Sullivan.

MR. SULLIVAN: I understand that, Your Honor, but it seems to me the burden is on he who asserts, and I haven't seen any evidence here of any lack of investigation or any frivolous attitude of any of the matters of any –

THE COURT: Well, I understand that you say that. My question of you is whether or not you see any value then at this stage in getting this additional information from Mr. Johnson before we proceed?

MR. SULLIVAN: Well, I guess what I'm doing is echoing Mr. Williams. If the court has already determined that there ought to be sanctions, and I am arguing vehemently right now against that, then perhaps we need this other information. But until such time that it's been determined that sanctions are called for, I don't see the relevance of this information. I agree with Mr. Williams.

THE COURT: Well, the court expects to take both matters up at the same time, and we will do just that ...

* * *

Pp. 36 - 41

THE COURT: Thank you, ma'am.

Anything further?

MR. SULLIVAN: Just very briefly, Your HOnor.

THE COURT: Mr. Sullivan.

MR. SULLIVAN: I think that a lawyer has not only the right, the absolute duty, in the absence of overwhelming evidence to the contrary that he stumbles across, to believe his client, to believe his clients and what they tell him. I think it's interesting to note that this court has ruled in this case that there aren't any issues of material fact. In other words, the stories of the parties on both sides were fairly consistent. There weren't any great issues of fact as Your Honor determined. I personally think Your Honor was

incorrect in that determination, but nevertheless that is what the court ruled. And I think that rather suggests that Mr. Carman was telling me the truth. And then the duty that I saw, and I think this to be well recognized in the Code of ethics and in the law generally, and that is that a lawyer, if he's got what he believes to be the actual facts which I thought I did, I still to this date think I did, he has the duty then to assert any reasonable legal argument by way of defense or counterclaim that his imagination can conjure up that might be the law or ought to be the law, not just what the precedent or statutes may say is currently or existing law. And we asserted the arguments in good faith. There has been no showing by the plaintiff of any lack of investigation or any lack of good heart or any lack of good faith in going into this. And unitl they overcome their initial burden to show that there was something that was done wrong in this thing, I mean, I think we get ahead of ourselves when we start talking about the amounts of sanctions or how the liability ought to be allocated. I think that's a little premature.

Thank you, Your Honor.

THE COURT: Mr. Sullivan, do I understand you to say that everything you did in this case was the result of the representations made to you as to the facts by Mr. Carman?

MR. SULLIVAN: Your Honor, I would have to say that's true, that plus what my own investigation revealed.

THE COURT: What did your own investigation reveal besides what Mr. Carman related to you?

MR. SULLIVAN: Well, I talked with several people, including Bob Pace, who was the general manager at Oceana. I talked with several of the officials of the Bank, including Howard Hudson, the general counsel; Phil Day, their outside counsel in Darlingon, South Carolina; Joe Sanders at the Bank, who was the loan officer on this account. Those names come right off the top of

my head.

THE COURT: What did Mr. Pace tell you? What is it that Mr. Pace told you that was in addition to or different from that which Mr. Carman told you?

MR. SULLIVAN: Well, Mr. Pace gave me some information about the similar acts of the Bank that helped give rise to the RICO counterclaim. Further investigation revealed that there was some basis for that.

THE COURT: Further investigation revealed what?

MR. SULLIVAN: That there was some basis for Bob Pace's, admittedly at that time secondhand information to me, that the Bank had similarly mistreated other of their borrowers.

THE COURT: You never presented any of that to the court.

MR. SULLIVAN: I most certainly did. I presented the affidavit of Burgess Johnson.

THE COURT: You must be jesting, but go ahead.

MR. SULLIVAN: I'm not jesting.

THE COURT: Well, we've dealt with the Burgess Johnson affidavit as you know.

MR. SULLIVAN: The court ordered that his affidavit be stricken, but that doesn't mean that he is not a real person and what he said is not true.

THE COURT: And aside from Mr. Pace acquainting you with what Mr. Burgess Johnson had to say, what else did he tell you?

MR. SULLIVAN: Well, there was another fellow involved by the name of Watson, I believe.

THE COURT: And who was this Watson individual and where did it surface in the case?

MR. SULLIVAN: It's referred to in the Burgess Johnson affidavit.

THE COURT: I see. Anything else?

MR. SULLIVAN: No, Your Honor.

THE COURT: And then what is it that the Bank's counsel and officers told you about the case that Mr. Carman hadn't already told you?

MR. SULLIVAN: They more or less confirmed what Mr. Carman had told me. I was pretty well prepared when I met with them.

THE COURT: And where in the case does there appear what counsel for the Bank and officers of the Bank told you about the matter that confirmed what Mr. Carman said?

MR. SULLIVAN: Oh, I believe the depositions of Joe Sanders and Howard Hudson go into that series of meetings and telephone calls that I had with the two of them. There was no dispute about the underlying facts.

THE COURT: And what is it that they said to you that you put into the record in this case on the motion for summary judgment?

MR. SULLIVAN: I would have to go back and read my memorandum. I am sure, as a matter of fact, I specifically recall citing to the deposition of Mr. Sanders. I don't recall right now, without going back through my file, whether I referred to anything in the Hudson deposition or not.

THE COURT: As I understand it then, the information that Mr. Carman gave you was affirmed by the Bank's officers and its counsel in some respects.

MR. SULLIVAN: In most respects, Your Honor. There were some minor variations.

THE COURT: In most respects then.

MR. SULLIVAN: Yes.

THE COURT: And beyond that, the further investigatory information that you got was ultimately supplied by Mr. Johnson, that having been referred to you by Mr. Pace.

MR. SULLIVAN: Well, and as matters develped, Mr. Pace

kept supplying information to me, of course.

THE COURT: Mr. Pace did what, sir?

MR. SULLIVAN: Continued to update us with respect to what was going on. There were some developments. For example, there was a question about the commercial validity of the -- or the commercial reasonableness of the manner in which the Bank disposed of the equipment. We had several discussions with Mr. Pace about that and about all aspects of this case.

THE COURT: Anything else?

MR. SULLIVAN: No, Your Honor.

THE COURT: Thank you.

MR. SULLIVAN: Thank you, Your Honor.

THE COURT: Mr. Johnosn , have you anything further on any of those matters?

MR. JOHNSON: Your Honor, I'll try to be as brief as I can because I indicated earlier that I'm prepared to submit the motion on the record.

APPENDIX VIII

Excerpts from the Memorandum of the United States District Court for the Southern District of West Virginia, entered August 2, 1990, in the case of *UCB v. Donald C. Carman, et al.*, CA. No. 2:85-1461.

* * *

P. 8

Little discusison is necessary on the motions for sanctions of Willard A. Sullivan, Donald C. Carman and D.C. Industries against the plaintiff. The plaintiff filed a collection suit in which it sought to recover property fraudulently transferred and was met from the

beginning with meritless defenses, frivolous counterclaims, and delaying tactics on behalf of the defendants and their attorney. While the plaintiff did not prevail against D.C. Industries, its claims against that entity were not without reason inasmuch as Mr.s Carman was an officer and stockholder (along with the Carman daughters) of that corporation, which was but one of the corporate entities comprising the Carman group that otherwise was indebted to or had undertaken to defraud the plaintiff. It is also observed that D.C. Industries did not prevail on the fanciful counterclaim in which it joined against the plaintiff.

* * *

P. 14

Sullivan emphatically asserts that he conducted a reasonable investigation prior to filing pleadings and that he saw all the appropriate documents prior to the meetings with the plaintiff's vice president and general counsel in 1985. Indeed, Mr. Sullivan concedes that the facts of this case were largely undisputed.

Notwithstanding these bold assertions, no specific evidence to support the allegations in the counterclaims has been produced during the course of this litigation. The only evidence submitted by Mr. Sullivan were two affidavits, his own and that of Burgess O'Neal Johnson, which contained only conclusory allegations and contained not one fact in suport of the allegations in the counterclaim. As earlier noted, these affidavits were stricken by the court as irrelevant.

* * *

P. 16

While Mr. Sullivan may have filed the counterclaims

subjectively believing them to be well-grounded in fact, no reasonable attorney, under similar circumstances, faced with the complete absence of a factual basis with which to support the RICO and other claims, could have filed such pleadings with the reasonable belief that they were well-grounded in fact.

* * *

P. 18

Finally, the defendants produced a useless affidavit by Mr. Johnson which was filed on April 16, 1987. The Johnson affidavit was struck shortly thereafter by the court along with the grant of summary judgment in favor of the plaintiff on May 13, 1987.

* * *

P. 23

Inasmuch as the plaintiff failed to prevail against D.C. Industries, no sanctions will be levied against that entity.

* * *

P. 24

It is noted by the court that Mrs. Carman was an officer of D.C. Industries, see Response of Emma Lou Carman to Plaintiff's Motion for Costs, Expenses, Attorney's Fees and Other Sanctions at 2; however, that entity was not prevailed against by the plaintiff.

* * *

P. 27

In evaluating the sums requested in plaintiff's motion for

sanctions, however, it is noted that the plaintiff's counsel, David D. Johnson, III, acknowledges that the allocations as between the counterclaim and the meritless defenses in the answer are not precise and may be overweighted in favor of the counterclaim by a maximum of 5%. Deducting 5% from the $66,852.42 figure leaves the sum of $63,509.80 for fees and costs attendant to work on the counterclaim,. As to the sums expended in pursing the motion for sanctions, some portion has been devoted to recovery on account of meritless defenses

CERTIFICATE OF SERVICE

I, Willard A. Sullivan, pro se, hereby certify that I served the required copies of the foregoing upon David D. Johnson, III, Esq., at Spilman, Thomas, Battle, & Klostermyer, by personal delivery on the 21st day of February, 1992.

/s/ Willard A. Sullivan
Willard A. Sullivan,
Pro se

CERTIFICATE OF SERVICE

I, James H. Coleman, a member of the bar of this Court, hereby certify that I served three copies of the foregoing upon David D. Johnson, III, Esq., at his office at United Center, Charleston, WV on the 27th day of March, 1992.

/s/ James H. Coleman
James H. Coleman